In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 303

ALASKA INDUSTRIAL BOARD and CARL E. JENKINS,

Petitioners,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC., a corporation, and GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

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OPINIONS BELOW.

The opinion of the Court of Appeals (R. 88-106) is reported at 245 F. 2d 855; and the opinion of the District Court (R. 56-60), at 122 F. Supp. 210.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 29, 1957 (R. 107). The petition for a writ of certiorari was filed on July 22, 1957, and was granted on October 14, 1957. The jurisdiction of this Court rests on Title 28, U.S. Code, Sec. 1254 (1).

STATUTES INVOLVED.

This case involves the construction of certain provisions of the Alaska Workmen's Compensation Act. The relevant portions of the Act are too lengthy to be set out verbatim here, and hence are printed in the Appendix, *infra,* pp. i-xii.[1]

QUESTION PRESENTED.

In an industrial accident a workman lost his left arm, his right leg and four toes of his left foot. By reason of the loss of the arm and leg, the workman became entitled to a scheduled lump-sum award of compensation for "total permanent disability." His left foot, however, was slow in healing, and this resulted in the workman being totally (but only temporarily) disabled from earning a living, for a limited period of time.

During the period of healing of the left foot, and after having received the award for the loss of an

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[1] Alaska Compiled Laws Annotated 1949, Vol. 2, Secs. 43-3-1, 43-3-10, 43-3-22, pp. 1221, 1223-1228, 1235, 1244-1245.

arm and the other leg, was this workman entitled to compensation for temporary disability?

STATEMENT.

The facts, essential to a consideration of the question presented here, are as follows:

1. On September 21, 1950, while in the course of his employment with Chugach Electric Association, Carl E. Jenkins came into contact with a high voltage electric line and received serious injuries. This resulted in a series of three surgical operations, i.e., the amputations of Jenkins' left arm near the shoulder, the right leg below the knee, and four toes of his left foot (R. 13-14, 15-16, 18-20, 41-42, 56). The last amputation (the right leg) took place on October 28, 1950 (R. 46).

2. The left foot failed to heal (R. 12-16, 18, 22-27), and was still under treatment at the time of the doctor's last report of December 17, 1953 (R. 26-27). Because of this, Jenkins had been unable to secure gainful employment (R. 19, 27, 42), and was thus in a state of continuing disability—temporary in duration, but while it lasted, total in scope.

3. Following the injury, respondents paid Jenkins compensation for temporary total disability under the "Temporary disability" provision of the Alaska Workmen's Compensation Act, Sec. 43-3-1, Alaska Compiled Laws Annotated 1949.[2] This was paid at

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[2]Appendix, *infra*, p. v.

the rate of $95.34 a week for approximately 38 weeks —a total of $3,645.00 (R. 36, 42).

4. On July 25, 1951, respondents reversed their position. They decided that Jenkins had been totally and permanently disabled since October 28, 1950, when the last amputation took place. They recognized that he was entitled to $8,100.00, as the scheduled lump-sum award for the loss of an arm and a leg,[3] but deducted from it the sum of $3,645.00 previously paid as temporary total disability. Hence, respondents sent to Jenkins on July 25, 1951, their check for $4,455.00—for the purpose of closing the claim (R. 44).

5. Jenkins then applied to the petitioner, Alaska Industrial Board, for continuing benefits for temporary disability, despite the allowance of the lump-sum award for permanent total disability (R. 39-40). This application was granted by the chairman of the Board on November 12, 1952, on the ground that temporary total disability had continued since October 28, 1950. He awarded Jenkins $3,645.00, which respondents had deducted from the $8,100.00 lump-sum payment, and in addition awarded further compensation for total temporary disability caused by the failure of the left foot to heal and "until a medical end result is reached" (R. 41-45).

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[3]Sec. 43-3-1, ACLA 1949. "[loss of members as total permanent disability.] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability."

6. On February 6, 1953, after a review by the full membership of the Board, the chairman's decision and award was vacated and set aside by the other two members. Here it was held that since Jenkins had suffered a "total permanent" disability on October 28, 1950, when the final amputation took place, no compensation for "total temporary" disability was thereafter payable (R. 46-47). However, Jenkins was allowed $476.70 as total temporary disability compensation for a period of 35 days prior to the operation of October 28, 1950 (R. 47).

7. Later the matter was considered again, and on January 8, 1954, the Board reversed its prior action of February 6, 1953. This time the Board held that a condition of total temporary disability had existed on and after October 28, 1950, and that it still continued since no "medical end result" had been reached (R. 52). This meant that Jenkins was entitled to temporary disability compensation at the rate of $95.34 a week from October 28, 1950 and until his left foot had either healed or had been restored physically as far as possible by medical means.

8. Thereafter, respondents instituted this action in the District Court to set aside the Board's decision (R. 28).[4] On July 27, 1954, that Court filed its written opinion reversing the Board's action and holding that an award for temporary total disability could not be granted for physical disability arising from the same accident in which a scheduled, lump-sum award for "total permanent disability" had been granted (R.

[4]Sec. 43-3-22 ACLA 1949—Appendix, *infra*, p. x.

56-60). Judgment was entered for respondents on July 30, 1954 (R. 61-62). Petitioners applied for rehearing (R. 62-63), but this was denied by the District Court on October 7, 1954 (R. 64).

9. An appeal was taken by petitioners (R. 63), and the matter was argued twice: once, before the regular 3-judge division of the Court of Appeals (R. 84), and then later, before the same Court sitting in banc (R. 85-86). On April 29, 1957, the Court below upheld the ruling of the District Court. It was held that after a workman had lost an arm and a leg and had thus suffered injuries severe enough to entitle him to a scheduled award for "total permanent disability", he could not thereafter be awarded weekly benefits for "total temporary disability"—despite the fact that other and separate injuries, suffered in the same accident, were slow in healing and thus prevented the workman from becoming gainfully employed for a limited period of time (R. 94-97).[5]

10. Chief Judge Denman and Judge Pope dissented. It was their opinion that a liberal construction of the Alaska Workmen's Compensation Act required a holding that Jenkins was entitled to temporary disability compensation during the period of healing of his left foot, despite the fact that he had received a fixed, lump-sum award just by reason of having had two amputations of other members of his body. They felt that the majority had interpreted the Alaska Act harshly and unreasonably, and had established a most harmful rule of construction for the circuit. They,

[5]245 F. 2d 855, 860-862.

therefore, urged that the judgment of the District Court be reversed (R. 100-106).[6]

SUMMARY OF ARGUMENT.

1. The Alaska Workmen's Compensation Act, like other legislation of this type, places benefits for physical injury in two separate and distinct categories. One provides payments for wage loss, based on a concept of actual inability to earn wages during the healing period. The other, which ignores wage loss entirely, provides lump-sum scheduled awards which are based on a medical appraisal of the permanent physical impairment resulting from an injury.

There is no inconsistency in permitting payments of both types of compensation to an injured workman, even when he suffers a loss of two limbs in an accident and thus immediately becomes entitled to the maximum scheduled award for permanent disability. If there is incurred in the same accident an injury separate and distinct from those that qualify the man for the maximum award for permanent disability, and this separate injury fails to heal for a certain period of time, this injured workman should receive the "Temporary disability" payments provided for in the Act as compensation for loss of wages during the healing period. The statute requires such payments for "all injuries causing temporary disability", and other language in the Act does not require or suggest

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[6] pp. 864-867.

that "all" should be given other than its ordinary and plain meaning. In fact, only this broad and unlimited construction of "all" is appropriate in the light of the context of the entire law. Consequently, when Jenkins' left foot failed to heal for a limited period of time and thus deprived him of the opportunity to earn wages, he ought to have been paid temporary disability compensation for this period—regardless of the fact that when he lost his right leg and left arm in the same accident he immediately became entitled to the fixed award of compensation for permanent and total disability.

2. The Court below has held that if a man loses two limbs in an industrial accident, and thus becomes at once entitled to the maximum scheduled award for total and permanent disability, he is "conclusively presumed" to have no remaining ability to work. Therefore, it is said, there is no foundation for temporary disability benefits, despite the fact that the slowness in healing of a separate and distinct injury incurred in the same accident causes this man an actual temporary disability and consequently loss of wages.

This narrow construction of the Act leads to the most incongruous results. It would mean that one who is less severely injured, and suffers less disability, would receive more compensation than one who is more seriously disabled. It would mean that if Jenkins were injured in some other employment and thus unable to earn wages for a limited period of time, he could receive no compensation at all under the Act.

It would mean that if a man loses one arm in an industrial accident and thus incurs a 50% partial permanent disability, he should receive as temporary disability compensation during the healing period not 65% of his actual wages, as the statute provides, but only one-half of that amount.

This shows how untenable is the position of the Court below in its interpretation of the Alaska Act. It shows a construction which nullifies the purposes for which the statute was enacted. It is a virtual repudiation of the doctrine that workmen's compensation statutes should be liberally construed in furtherance of such purposes.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

The facts are not in dispute. Jenkins suffered personal injuries, accidental in nature, which arose out of his employment with respondent, Chugach Electric Association. They were compensable injuries under the Alaska Workmen's Compensation Act.[7] The sole question is whether Jenkins has received the entire amount of compensation to which he is entitled.

If Jenkins had lost only one arm he would have qualified for compensation under the "Partial permanent disability" schedule of the Act, and since he was married and had one child, would have been entitled to the lump-sum award of $4,050.00. If he had

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[7]Sec. 43-3-1 ACLA 1949—Appendix, *infra*, p. i.

lost only one leg, then he would have received the same scheduled award of $4,050.00.[8] But since he lost both members in this one accident (the left arm and right leg), he came under the "Total and permanent disability" schedule[9], and was entitled to the maximum award of $8,100.00.[10] This is the amount of money that Jenkins has received (R. 36, 42, 44).

The physical condition resulting from these two amputations soon became static, i.e., within one year his wounds had apparently healed for he was fitted with an artificial arm and leg. Although physically impaired to a great degree, nothing further in the way of medical treatment had to or could be done to improve his condition (R. 12-13).

If there had been nothing else the matter, Jenkins would have then had some actual remaining ability to return to work and earn "some sort of a living",[11] in spite of his severe injuries. But in the same accident, and in addition to the two amputations, his left

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[8]Sec. 43-3-1 ACLA 1949 [Partial permanent disability]—Appendix, *infra*, pp. ii-v.

[9]Sec. 43-3-1 ACLA 1949 [Loss of members as total permanent disability]—Appendix, *infra* p. vi.

[10]Sec. 43-3-1 ACLA 1949 "[Total and permanent disability] Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) [Married person] If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars ($7,200.00) with Nine Hundred Dollars ($900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars ($9,000.00)."

[11]See last paragraph of Doctor Howard G. Romig's report of December 17, 1953 (R. 27).

foot was so severely burned that amputation of four toes was necessary. And here the healing process was so slow, and so much trouble was encountered with breakdowns and slough of the tissues,[12] that as late as December 1953 Doctor Romig reported as follows:

> "It is a well known fact that injuries of this kind are extensive, severe and long in recovery. I have seen Mr. Jenkins regularly since the date of his injury except for the time he spent in Seattle under the care of Doctor Louis Edmunds.
>
> "As it stands today, Mr. Jenkins' remaining foot is relatively useless but is improving. This foot is unhealed and requires attention regularly.
>
> "As far as I am concerned, Mr. Jenkins is disabled and unable to be gainfully employed since date of injury, because he has been under treatment. The fact that he has been up and about and able to do a few gainful things does not alter this estimation a bit.
>
> "In my opinion he will require rehospitalization for a sympathectomy, re-amputation and plastic repair to the ailing foot. This will restore him to a state of permanent partial disability. After this he should be able to make some sort of a living." (R. 27)

Thus, it was during the period of healing of his left foot that Jenkins suffered a total loss of earning power; it was because of this particular injury that he was unable to be gainfully employed. Although

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[12]See Doctor Romig's report to the Alaska Industrial Board of May 2, 1952 (R. 13) and his letter to Attorney John Shaw of July 18, 1952 (R. 79). See also Doctor O'Malley's report of July 18, 1952 (R. 15-16).

this loss of earning power was total while it lasted, it was not permanent; for medical opinion was hopeful, and predicted, that with continued treatment Jenkins would be eventually restored to a "state of permanent partial disability", and then "should be able to make some sort of a living."[13]

The ultimate question, then, is whether during this period of temporary disability Jenkins was entitled to be paid additional compensation, as a partial recompense for wages lost during that period, under that provision of the Act which provides as follows:

> "[Temporary disability.] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule. * * *"[14]

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[13]Doctor Romig's report of December 17, 1953 (R. 27). When Doctor Romig refers to the term "state of partial permanent disability" he obviously is not using the term in the precise legal sense as used in the Act, i.e., to denote a specific scheduled award; but is referring to the fact that after Jenkins' foot was healed he would be severely crippled and disabled but would still have some actual remaining ability to do work.

[14]Sec. 43-3-1 ACLA 1949 [Temporary disability].

1. The Plain Wording of the Statute Requires the Payment of Additional Compensation.

Workmen's compensation legislation places benefits for physical injury in two categories: (1) wage loss payments based on a concept of actual disability, or proved inability to earn wages during the period of healing and until an injury has become stabilized; and (2) permanent schedule awards, based on medical condition and an appraisal of the permanent effects of an injury after a "medical end result" has been reached, and which ignores wage loss.[15]

The Alaska Act is typical in this respect. Taking the latter category first, the Legislature has set up a series of lump-sum, scheduled awards for "Total and permanent disability"[16] and for "Partial permanent disability".[17] It is clear from reading these sections of the law that when one has been injured in an industrial accident and the injury results in some degree of permanent physical impairment, the injured person will receive a definite amount of money in any event—without regard to proof of actual wage loss. It would be immaterial that the claimant, after the accident, may have been regularly employed at greater earnings than before.[18]

But this does not point to a deviation from the underlying principle of workmen's compensation leg-

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[15]Larson, *Workmen's Compensation*, Vol. 2, Sec. 57.10, p. 3; ibid., Sec. 58.10, p. 42 (1952 ed.).

[16]Sec. 43-3-1 ACLA 1949—Appendix, *infra*, p. ii.

[17]Sec. 43-3-1 ACLA 1949—Appendix, *infra*, pp. ii-v.

[18]Larson, *Workmen's Compensation*, Vol. 2, Sec. 58.10, p. 42; *NACCA Law Journal*, May 1948, Vol. 1, No. 1, pp. 35-36.

islation—that benefits are related to loss of earning capacity and not merely to injury as such. The theory is the same, but some norm or standard (perhaps from observed probabilities) must be devised from the necessities of the case. It would be impracticable to hold open for a lifetime every case that involved some degree of permanent injury, in order that new estimates could be made on the effect of the injury on earning power every time the claimant contended that his earning capacity was being adversely affected. This would be an impossible administrative task, and in order to avoid it the Legislature has established a schedule of arbitrary indemnities for the loss of a leg, an arm, etc., and other permanent bodily injuries.[19]

This establishes what the courts have termed a "conclusive presumption of loss or reduction of wage earning capacity."[20] Thus, when one under the Alaska Act has lost an arm, he is "conclusively presumed" to have had his earning capacity impaired, and he receives an award of a specific sum of money. If he loses both arms, or one arm and one leg, the conclusive presumption again is that his earning capacity has been impaired—this time to a greater degree—so that he will receive as compensation twice the amount of money that he would have received for the loss of one arm or one leg. This is the

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[19]See Larson, *Workmen's Compensation*, Vol. 2, Sec. 58.10, pp. 42-43.

[20]*Bethlehem Steel Co. v. Cardillo*, 229 F. 2d 735, 736 (CA-2 1956); *Travelers Insurance Company v. Cardillo*, 225 F. 2d 137, 144 (CA-2 1955).

maximum amount that the statute allows for permanent injuries.

But specific, arbitrary indemnities paid, or the "price tags" for such injuries, do not in fact represent an actual loss of wages in the future. Thus, if a man receives $4,050.00 for the loss of an arm, this does not and cannot mean that his future earning capacity, for the remainder of his life, has been reduced by this precise amount. He may earn more, or he may earn less.

Consequently, it is perhaps an unfortunate choice of words that has led the courts to speak of a "conclusive presumption" that there has been any particular degree, such as a 50%, 75%, etc., or even 100%, loss of earning power. What is really meant is that the loss of a member of the body or for some other permanent physical impairment, a certain amount of compensation should be paid in any event, without regard to actual earning power. Thus there is not so much an irrebuttable presumption that there has been a partial or total impairment of capacity to earn wages, as much as there is a legislative declaration that based on experience in the average case there probably has been a degree of such impairment, but that since it is impractical to compute it, actual gain or loss in earnings will be disregarded.

Therefore, as a matter of practical necessity, in cases where permanent physical impairment result from an injury, actual earnings are simply not given any consideration at all. But it does not follow that this is true where the Legislature has expressly meas-

ured the amount of compensation by the injured man's actual wages. This other category of compensation for physical injury, as it has been pointed out above, is based upon wage loss or actual inability to earn wages during a period of healing and until a man is either cured and can get back to work or until he has been restored physically so far as possible by medical means. This is what obviously is contemplated by that provision of the Alaska Act entitled "Temporary disability."[21]

Here it is provided that for all injuries causing temporary disability the injured employee shall be paid, during the period of disability—

> ". . . sixty-five percentum (65%) of his *daily average wages.*" (emphasis added).

Further, it is provided that payments shall be made at the time—

> ". . . compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor . . ."

The "average daily wages" of the employee are determined by his "actual earnings", if they are fairly representative; and if not, then the Alaska Industrial Board must determine such earnings having due regard to—

> ". . . the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance . . . which may affect *his capacity to earn wages in his temporarily disabled condition.*" (emphasis added).

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[21]Sec. 43-3-1 ACLA 1949—Appendix, *infra*, p. v.

Clearly, then, actual earnings are the foundation of the payment of this class or type of compensation. Therefore, it is illogical to hold, as the Court below did, that when Jenkins received the maximum scheduled award for permanent disability, there immediately arose the conclusive presumption that he had no remaining ability to work and, therefore, that there was no foundation for temporary disability benefits.[22] In the category of scheduled, arbitrary awards for permanent injury, whether partial or total, actual wages are not considered. But in the category of payments of compensation for temporary disability, actual wages not only are considered but constitute the sole basis or measure of the compensation to be paid. The very purpose of payments of the latter type is to compensate the employee for wages lost during the healing period and until he is able to return to work.[23] There simply is no room here for any kind of a "presumption" as to a reduction or loss in wage earning capacity. Established facts alone, and not legal presumptions, govern the disposition of a case where temporary disability compensation is claimed.

Once the distinction between permanent and temporary disability compensation is understood, there is no difficulty in applying the plain wording of the statute to permit the payment of both types of compensation to an injured workman. This is what the statute expressly provides. It refers to "all" injuries

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[22]Majority opinion of the Court below (R. 96).

[23]*Vanney v. Alaska Packers Association*, 12 Alaska Reports 284, 291 (DC-Alaska 1949).

causing temporary disability. The word "all" should be given its ordinary and plain meaning, so as to encompass any injuries whatever—including those where a loss of two limbs suffices to qualify a man for the maximum scheduled award for total and permanent disability. The words "all injuries" are not only capable of this broad, unlimited construction, but in fact, no other construction is even appropriate.[24] Logically, therefore, it should be held that reference is being made here to any kind of an industrial injury, no matter how severe or disabling. If the injury causes a temporary disability in fact, then it is compensable under this part of the statute.

Jenkins was injured on September 21, 1950 (R. 3), his second amputation (the right leg) took place on October 28, 1950 (R. 46), and within one year from the time of the accident he had been fitted with an artificial arm and artificial leg (R. 12). Consequently, it is fair to presume that by September 1951 Jenkins' condition was stabilized; all that could be done for these two limbs had been done, and without reference to other injuries he then should have been able to turn to some type of employment available to a man in his condition.[25]

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[24]Cf. *United States v. Five Gambling Devices*, 346 U.S. 441, 449-450, 452, 98 L. ed. 179, 188, 189.

[25]In his dissenting opinion in the Court below, Chief Judge Denman said:

> "It is obvious and admitted by the majority opinion that an employee's loss of two limbs, here a hand and a foot, does not create his total disability to work. There are many employments for a person with one good hand who can walk with an artificial leg or for one who has two good hands and a wheel chair." (R. 100.)

However, Jenkins was unable to return to work—not because of the amputations or his "total and permanent disability", but because of the failure of his other foot to heal (R. 13-16, 18-22, 24-27). This distinct injury was incurred in the same accident as that which necessitated the other two amputations, but it was an injury separate and apart from the other and one which had nothing to do with the permanent disability compensation that was paid. It was a "disability" that caused Jenkins an actual loss of wages, and it was "temporary" because in time it would be remedied (R. 13-14, 26-27). Logically, then, it comes within the purview of "all injuries causing temporary disability",[26] and it should constitute the basis for payments of compensation for wage loss during the healing period.

Petitioners submit, therefore, that contrary to the thinking of the majority of the Court below, there is a "foundation for temporary disability benefits."[27] That there may not be a "foundation for an additional partial disability award . . . if it became necessary to amputate Jenkins' left foot",[28] is not the point. This is not petitioners' theory; and in view of the "second injury" provisions of the Alaska Act, it may be that one cannot receive more than the maximum scheduled award for permanent disability.[29] The

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[26]Sec. 43-3-1 ACLA 1949 [Temporary disability], *supra*.

[27]See majority opinion of the Court below (R. 96)—245 F. 2d 855, 862.

[28]Ibid.

[29]Sec. 43-3-1 ACLA 1949. "(12) [Injury causing total permanent disability when combined with previous disability.] In those cases where an employee receives an injury arising out of and

point that petitioners are making here is based upon quite a different theory: that the Alaska statute provides that a fixed award shall be given for certain specified injuries which cause permanent physical impairment, and in addition, provides compensation for a temporary loss of earning power which remains after the injury.

2. The Decision of the Court Below Is Unjust. It Repudiates the Rule That Workmen's Compensation Statutes Should Be Liberally Construed.

The narrow construction of the Act by the Court below leads to the most incongruous results:

(a) A man earning $145.00 a week might severely burn or crush his arm and leg in an industrial accident, and be hospitalized and receiving medical treatment for a period of three years before he is able to return to work. During this time he would be entitled to receive temporary disability payments in an amount equal to 65% of wages—or a total of approximately $15,000. It may be that the doctors are able to save his arm and leg and restore them to a point where the Board will "rate" the injured workman as having a 75% partial permanent disability. This would mean that he would then receive

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in the course of his or her employment which, if itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury fund hereinbefore created and provided."

a scheduled award of approximately $6,000, which would be in addition to the $15,000 previously paid.

On the other hand, a man like Jenkins who has had his arm and leg amputated within a month after the accident is immediately entitled to receive $8,100.00 as permanent disability compensation. Under the rationale of the Court below, he would receive nothing more—despite the fact that he was unable to earn wages for a period of three years while his wounds were healing.

Thus the man who ultimately turns out to be less severely injured than Jenkins receives approximately $13,000 more compensation. Jenkins is penalized because of the entirely fortuitous circumstance of having his limbs amputated at approximately the time of the accidental injury, rather than three years later. When the Act is readily susceptible of an interpretation that will avoid this harsh result,[30] there is no room for the assumption that the Alaska Legislature intended one who is less severely injured, and suffers less disability, to receive more compensation than one who is more seriously disabled. Cf. *Baltimore and Philadelphia Steamboat Co. v. Norton,* 284 U.S. 408, 413, 76 L.ed. 366, 369 (1932).

(b) Although the record could not show this, Jenkins returned to work for Chugach Electric Association in January 1955, checking and repairing electric meters. It is conceivable that in the course of this employment he could receive a disabling injury and

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[30]See Part 1 of this brief, *supra.*

thus be unable to earn any wages for a period of several months.

But according to the reasoning of the Court below, when Jenkins lost him arm and leg in 1951 he was "conclusively presumed" to have no remaining ability to work. A logical extension of this interpretation would require the denial of temporary disability payments as compensation for wages actually lost during the period of healing of this hypothetical subsequent injury.[31] This, in spite of the broad scope of the Alaska statute which encompasses *all* employees who receive injuries in the course of their employment, and not merely those persons who, prior to an otherwise compensable accident, have not lost an arm and a leg.

(c) An employee (married and having one child) might lose one arm in an accident, and he immediately would be entitled to $4,050.00 as compensation for partial permanent disability.[32] Since this would be precisely one-half of the amount that he would receive if he had lost both arms, or an arm and a leg, it is only fair to presume that this man's degree of permanent disability is 50% of total disability.

The Court below has stated that

> "* * * In the case of loss of certain members, total and permanent loss of earning power is

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[31]There can be no escape from such a harsh conclusion. The majority opinion says this:

> "Under the presumption, whatever the facts may be, there is no remaining ability to work, and therefore no foundation for temporary disability benefits." (R. 96.) 245 F. 2d 855, 862.

[32]Sec. 43-3-1 ACLA 1949 [Partial permanent disability]—Appendix, *infra*, pp. ii-v.

> conclusively presumed for the purpose of awarding compensation under the act. * * * Under the presumption, whatever the facts may be, there is no remaining ability to work, and therefore no foundation for temporary disability benefits."[33]

If this statement is true, then it must logically follow that when a man loses one arm he is conclusively presumed to have suffered a 50% permanent loss of earning power. Thus, the "remaining ability to work" would be only one-half of what it was before the accident, and the temporary disability compensation that this man would be entitled to during the period of healing should be reduced accordingly.

This is the necessary result of the majority decision of the Court of Appeals, even though the Act, without any ambiguity, requires disability payments equal to 65% of a man's actual wages. There is nothing in the law, or in former decisions of the Court below,[34] even remotely suggesting that the amount of the employee's wages should be reduced by the percentage of permanent disability that he has suffered. Untenable as it may be, this is exactly the position of the Court below in its narrow and strict construction of the Act.

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[33]R. 96—245 F. 2d 855, 861-862.

[34]See *Libby, McNeill & Libby v. Alaska Industrial Board, et al.*, 191 F. 2d 262, 264 (CA-9 1951).

The hypothetical cases noted above are to illustrate the harsh result of the lower Court's interpretation of the Act, and how unsound its position is. The strict and narrow construction of the statute must necessarily lead to harmful conclusions. If there were a clearly expressed statutory mandate that demanded this, then it would have to be accepted. But when the entire context of the Act reasonably demonstrates that it was drawn on an entirely different theory—a theory that would require the payment to Jenkins of the additional compensation which he is seeking—then the action of the Court below is not far short of a repudiation of the established rule that workmen's compensation statutes should be liberally construed in favor of the injured workman, and not so as to nullify the purposes for which they were enacted. In conclusion, the words of this Court in the case of *Baltimore and Philadelphia Steamboat Company v. Norton*[35] appear to be appropriate:

> "* * * Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interests and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. * * *"

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[35]284 U.S. 408, 414, 76 L. ed. 366, 370 (1932). See also: *Voris v. Eikel*, 346 U.S. 328, 333, 98 L. ed. 5, 10 (1953); *Czaplicki v. S. S. Silver Cloud*, 351 U.S. 525, 100 L. ed. 1387 (1956).

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals, and that of the District Court, should be reversed; and the case remanded to the Alaska Industrial Board for the purpose of awarding further compensation to petitioner, Carl E. Jenkins.

Dated, Juneau, Alaska,
November 18, 1957.

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(Appendix Follows.)